IN THE SUPREME COURT OF IOWA

NO. 11–0095

AMERICAN CIVIL LIBERTIES UNION OF IOWA FOUNDATION, INC.,
Appellant-Petitioner,

v.

RECORDS CUSTODIAN, ATLANTIC COMMUNITY SCHOOL DISTRICT,
Appellee-Respondent

APPEAL FROM THE IOWA DISTRICT COURT FOR CASS COUNTY
THE HONORABLE RICHARD H. DAVIDSON, PRESIDING
EQCV 024042

BRIEF

FOR PETITIONER/APPELLANT

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Routing Statement

This case should be retained by the Iowa Supreme Court because it involves a case of guiding importance under Iowa's Open Records statute and because only the supreme court can authoritatively resolve an apparent conflict among its prior decisions and also a conflict with a court of appeals case cited by the respondent. The result will have broad public importance for the resolution of public records disputes with school districts.

Statement of the Case

The ACLU of Iowa Foundation, Inc. ["*ACLU of Iowa*"] submitted an open records request to the Records Custodian of the Atlantic Community School District seeking public disclosure **only** of the nature and extent of the discipline that was imposed on two school employees who had conducted an illegal strip search. [App. 5] The school district refused to reveal what discipline it had imposed, and the ACLU then brought suit in district court under Iowa's *Open Records Act* to compel disclosure. [App. 5].

On cross motions for summary judgment the Iowa District Court for Cass County concluded that a description of the disciplinary measures imposed by the Atlantic school administrators was "**personal** information in **confidential** personnel records of public bodies including ...school districts" exempted from mandatory disclosure under Section (11) of Iowa's open records statute (Iowa Code Ch. 22). {*emphasis added*} [App. 46]

In reaching its conclusion, the district court refused to apply the balancing test established by the Iowa Supreme Court in *DeLaMater* and *Clymer*[1] as the proper analysis for determining which precise records fall

[1] DeLaMater v. Marion County Civil Service Commission, 554 N.W.2d 875 (Iowa 1996); Clymer v. City of Cedar Rapids, 601 N.W.2d 42 (Iowa 1999)

within within the personnel record exemption." [App. 45-6[2]] The district court, applying its own characterization to the information sought, determined that this was too clear of a case to warrant application of the balancing test. *Id.* The ACLU filed a timely appeal.

At stake is whether a school district can be compelled to disclose what –if any– discipline it imposed on officials who conducted a publicly alarming and apparently illegal strip search of high school girls. The issue is whether, in such a case as this, a district court is required to employ the balancing test established in *DeLaMater*.

Statement of the Facts

On August 21st, 2009, five Atlantic, Iowa high school girls were subjected to what was publicly reported as a "strip search" in an unsuccessful attempt to locate $100 that had been claimed missing by another student. [App. 14] The incident generated a great deal of media coverage and public concern. [App. 14] Two months prior to the search the U.S. Supreme Court handed down a decision describing the bra and panties

[2] The court wrote: "Discipline reports are job performance records and as such are exempt from disclosure." * * * "The disciplinary records requested by petitioner are 'essentially in house, job performance documents exempt from disclosure.'"

search of a 13 year old student for over-the-counter pain medication as a constitutionally unreasonable "strip search."[3] Safford Unified School District #1 v. Redding, 557 U.S.___, 129 S.Ct. 2633,*2642-3, 174 L.Ed.2d 354 (2009). Since 1986 the Iowa Code has categorically prohibited school officials from conducting strip searches; it provides: "A school official shall not conduct a search which involves: a. A strip search." Iowa Code §808A.2(4)(a).

Initially, the Atlantic school district publicly denied culpability for the body level search of its female students, and attempted to characterize the incident as something less than a "strip search." Atlantic Schools Superintendent Dan Crozier was quoted as saying: "According to our board policy it was an allowable search." [App. 35, 37]

Nevertheless, public concern over the strip search continued. [App. 5-11] On November 6th, 2009, Superintendent Crozier publicly announced that two school officials would be disciplined in connection with the incident. However, Mr. Crozier declined to identify the officials or discuss the discipline they would receive.

[3] "In sum, what was missing from the suspected facts that pointed to Savana was **any indication of danger** to the students from the power of the drugs or their quantity, and **any reason to suppose** that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable." *Id.*

The ACLU of Iowa, which identifies itself as a proponent and defender of the ban on strip searches by school officials[4], was concerned that the unspecific reference to disciplinary measures, taken together with past attempts at minimization of the incident, indicated the possibility of an ineffectual response by school administrators [App. 17-18]. Following up on Superintendent Crozier's announcement, the ACLU of Iowa directed a public records request to the school district, requesting identification of the staff members at fault and a description of the discipline they each received. The exact request was phrased as follows:

> Pursuant to Iowa Code Chapter 22, we request more information about the discipline of two Atlantic Community School staff members in response to the locker room strip search incident. Specifically, would you please identify the two individuals and share what specific consequences they received including duration or amounts of any penalties or consequences

[App. 2, 12]

On November 11, 2009, counsel for the school district replied, providing the names of the two employees who were disciplined, but refusing to provide information about the discipline administered. The ACLU of Iowa then brought this action seeking a disclosure of the specific discipline imposed by the administrators.

[4] The ACLU of Iowa was active in seeking passage of Iowa Code §808A.2.

ARGUMENT

I. The District Court erred in failing to use and correctly apply the *DeLaMater* balancing analysis.

A. Preservation of Error

The Appellant, ACLU of Iowa preserved error by submitting briefs calling for the application of the required balancing analysis [App. 43] and by filing a timely notice of appeal from the final Order of the district court. [App. 48]

B. Scope and Standard of Appellate Review

Because cases under Iowa's Open Records statute are heard in equity, the normal scope of review is *de novo*. Clymer v. City of Cedar Rapids, 601 N.W.2d 42,*45 (Iowa 1999). The appellate court gives deference to the factual determinations and characterizations of the district court, but is not bound by them; it gives no deference to the trial court's legal conclusions. Estate of Johnson, 739 N.W.2d 493,*496 (Iowa 2007). Given the fact that this case rests on an undisputed record, this court's focus will largely be upon the correction of any error by the district court in "its interpretation and application of pertinent statutes." *Clymer* at 45.

C. Legal Argument

1. The district court should have applied the *DeLaMater* balancing test.

a. Overview of the legal dispute

The district court said that this case "turns on whether the court must apply a balancing of private interests against the public's right to know in every case, or whether certain personal information is exempt from disclosure as a matter of law." [App. 43] In contrast, the Iowa Supreme Court has indicated that "we have followed the federal cases and employed a balancing test in applying this exemption, ..." DeLaMater v. Marion County Civil Service Commission, 554 N.W.2d 875,*879 (Iowa 1996)

The district court observed however, that in Des Moines Ind. Comm. Sch. Dist.[5], the Iowa Supreme Court did not include a balancing analysis in its opinion. [Order, p.5]. From this, the district court concluded that a balancing analysis is not always required—at least when the records sought are "employee evaluations." *See, DeLaMater* at 879-80 {noting that while the court in *Des Moines Ind. Sch. Dist.* had not "**explicitly**" employed a balancing test, the "in house, job performance" investigations sought in that case were clearly within the exception for "personal information in confidential personnel records."}

[5] 487 N.W.2d 667 (Iowa 1992).

There are problems with the district court's willingness to dispense with a balancing analysis in this case. At a minimum, *DeLaMater* and *Clymer* made clear that for any situation between the unequivocal extremes of "employee evaluations"[6] and "generic information" that the right of privacy would [*not*] protect[7] a balancing test must be employed. *See,* DeLaMater at 879-80: "the balancing inquiry is intensely fact specific" and **cases like *Des Moines Ind. Sch. Dist.* "are of limited assistance** where the materials sought are not evaluations of job performance which are confidential..." *Id.* {*emphasis supplied*}

b. The nature of the request

The records being sought in this case are not "employee evaluations." The Petitioner has only asked for disclosure of the remedial actions taken by management and for nothing about factual investigations into employee conduct, job performance, or evaluations. The focus of the request made is solely upon what the school administrators, themselves, have done to address **publicly disclosed** employee misconduct and not upon what the affected employees actually did or did not do to merit such punishment.[8]

[6] *E.g.* In re Des Moines Ind. Comm. Sch. Dist., 487 N.W.2d 667 (Iowa 1992)

[7] City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523 (Iowa 1980).

[8] Indeed, the request did not even ask which employee received which consequence.

c. The Defendant's burdens of proof were not satisfied

Iowa Code Section 22.7, Subsection 11 only protects information in personnel files that is "**personal**" and "**confidential.**" In a summary judgment context, the burden of proof and persuasion as to whether the information sought satisfies these criteria as a matter of undisputed fact and law is upon the school district. "The defendants bear the burden to demonstrate the applicability of an exemption." *DeLaMater* at 878.

It was incumbent for the school district to show that the legislature clearly intended the scope of the exception to cover the information sought in this case, under the specific facts of this case. Yet, neither the respondent school district, nor the district court, engaged in any legal analysis of legislative intent or fact-finding relative to its application to this case in determining whether the specific information requested was truly "personal" and "confidential." Instead, the school district asserted that a description of the disciplinary actions taken was "personal" and "confidential" merely because the "information is contained in the personnel files of the employees..." [∂'s Smry. Jdgmt. Brief p. 6; App. 23, 25, 28, 43]

The Iowa Supreme Court and other jurisdictions have already rejected the proposition that the specific physical location of requested information determines its status as a public or private record. "The nature of the record

is not controlled by its place in a filing system." Des Moines Independent School District v. Des Moines Register and Tribune Co., 487 N.W.2d 666, *670 (Iowa 1992) {"*Des Moines Schools*"}. Affording confidentiality to a piece of information simply because it had been stored in a personnel file "is unreasonable because it would lead to arbitrary and anomalous results." Comm'n on Peace Officer Standards and Training v. Superior Court, 42 Cal. 4th 278,*291, 64 Cal. Rptr. 3d 661, 165 P.3d 462,*468-9 (2007).

For its part, the district court made no finding that the subjects of the discipline had a reasonable expectation of privacy in non-disclosure of the penalties imposed by management on their publicly disclosed misconduct. Without such a finding, the limitation of the exception in Iowa Code Section 22.7(11) can't apply—for it only protects "confidential" information. A prior case of the Iowa Supreme Court provides guidance here:

> The legislature could have exempted employment applications from disclosure. Its failure to do so, coupled with its plain intent that we construe the exemptions narrowly, persuades us that the disputed applications do not fall within the section 68A.7(11) exemption.***** **No evidence was introduced to show disclosure would "substantially and irreparably injure" any applicant.** Under other specific criteria of section 68A.8, mere inconvenience or embarrassment is not enough.

City of Dubuque v. Telegraph Herald, Inc., 297 N.W. 523,*527-8 (Iowa 1980). {*emphasis supplied*}

Later, in DeLaMater at p. 879, the Iowa Supreme Court reiterated the importance of proving an asserted privacy interest: "[*In City of Dubuque*] [*w*]e also held the requested information, **in the absence of evidence to the contrary**, did not constitute "personal information that the right of privacy would protect." {*emphasis supplied*}.

As previously noted, the "balancing inquiry is intensely fact specific." DeLaMater at 879. The trial court below ignored the significance in this case of [1]prior public knowledge of the strip searches, [2]the public disclosure of the identity of the individuals responsible, and [3]public revelations that the individuals were punished by their employer [App. 19, 40-47]. Surely, such disclosures eliminated any continued expectation of privacy on the part of the responsible employees in preventing disclosure of the final details. At the very least, a fact issue has been generated. *Compare*, Rainey v. Levitt, 525 N.Y.S.2d 551 cited in *DeLaMater* at 881 {"court ordered disclosure [*of employment test scores*], relying on the fact that the names of these candidates had already been made public...."}.

d. No reasonable expectation of privacy existed

It seems ironic that the school district, which denies that the privacy of its school girls had been illegally invaded, continues to assert and defend the privacy expectations of those who were responsible for those invasions. We can borrow from the analytical approach of Fourth Amendment law in determining whether the disciplined employees really do have a "reasonable expectation of privacy." Analysis of that expectation has two components: [1]the subjectively held expectation must be actual and real, and [2]it must be objectively reasonable in the view of society at large. Katz v. U.S.[9].

Neither of the *Katz* criteria were met in this instance. First, no evidence was submitted that the affected employees were, in fact objecting to the disclosure sought, nor was it shown that they entertained a good faith belief in their right to keep the information private. Why was there no submission of affidavits from the supposedly aggrieved employees? Second, the assertion of privacy here is not one that society as a whole would generally accept as reasonable—nor especially so under the extenuating circumstances of this case.

[9] "...there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347,*361, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) J. Harlan, *Concurring Op.*

To start with, none of the information protected by Iowa Code §22.7(11) is reliably confidential. Legally, such information is only confidential **if** the custodian of the records chooses not to disclose it (Iowa Code §22.7[10]) or if some independent provision of law prohibits its disclosure. Here, neither the school district, nor the district court suggested any other provision of law that would prohibit disclosure of employee job performance evaluations, much less the limited and superficial information that was sought in this case. Disclosure by employers is common. Indeed, Iowa law even indemnifies employers from lawsuits based on disclosure of personnel records provided to prospective employers. *See* Iowa Code §91B.2 {permitting employers to share "work related information" about employees without incurring liability}. In a context where disclosures of the most damning sort may occur routinely, expectations of absolute privacy cannot be treated as either reasonable or credible.

From the perspective of case specific factors, an objectively reasonable expectation of privacy did not exist in this instance because the public had already learned of the conduct leading to the sanctions, the identity of the individuals responsible, and the fact that they had received some sort of discipline from their employer.

[10] The code section states that certain listed "public records shall be kept confidential, **unless otherwise ordered by...the lawful custodian of the records...**"

Finally, given their profession and child care responsibilities, school personnel must always expect a heightened amount of public scrutiny. *See,* Wisconsin News Press v. Sch. Dist. Sheboygan Falls, 199 Wis. 2d 768, 546 N.W.2d 143,*787 (1996) {noting the reduced privacy expectations of school administrators} and Hackworth v. Bd. Educ. City of Atlanta, 214 Ga. App. 17,*22, 447 S.E.2d 78,*82 (1994) {reduced expectation of privacy for school bus drivers based on welfare of children placed in their care}.

Without making any legal and evidentiary showing to overcome these factors, the School District should not have been granted a summary judgment holding that the requested information was "confidential" and therefore protected by Iowa Code §22.7(11)

e. Problems with the District Court's analysis

As a polestar for analysis, the Iowa Supreme Court has indicated that the exception contained in Iowa Code §22.7(11) is to be construed narrowly, but consistently with legislative intent. *DeLaMater* at 878. The district court, however, never engaged in any discussion of legislative purpose or intent before deciding to include the specific information requested in this case within the scope of the exception for private, confidential information in personnel files. The district court's precipitous conclusion, that the limited information requested in this case amounted to a request for "in-

house job performance records" [App. 46], stretched the boundaries of the exception defined by Iowa Code Section 22.7(11) without any inquiry into the complex and competing legislative objectives that are normally accommodated through application of the *DeLaMater* balancing analysis.

The district court decided that it could dispense with the normally required balancing of interests by simply analogizing with another case. The problem with this approach is that it erodes the right to public disclosure through creeping analytical boundaries: If "B" is related to "A" then "B" can't be disclosed. Then later, if "C" is considered related to "B", then "C" cannot be disclosed. How does such *ad hoc* analogy carry out the legislative intent better than the Iowa Supreme Court's carefully constructed balancing analysis? Where is the certainty in this approach? How does it serve up proper results in cases that are "intensely fact specific?" If the drifting analytical approach of the court below is sustained, any certainty as to when a balancing test should be employed will be lost. The right to public records will fall victim to decisions reached through rough approximation irrespective of case specific facts on the ground.

Two cases emboldened the district court in concluding that it could utterly dispense with *DeLaMater's* required balancing analysis. The first was *Des Moines Schools*. This case was decided four years **before**

DeLaMater and seven years **before** *Clymer*. As subsequently noted by the Iowa Supreme Court, a balancing analysis had not been "**explicitly**" employed in *Des Moines Schools* (*DeLaMater* at 879); but this rather guarded concession does not appear to have been an invitation to future courts to skip the balancing analysis that was being so carefully refined and re-affirmed[11] in that very same decision. For everything between a "job performance evaluation" and information that was clearly public in character, a case specific balancing analysis is required. *Id.; In accord, Clymer* at 47 {"Given the ambiguity of the statute, we believe the district court properly engaged in a balancing test of the competing interests."}

The district court's reliance on a second case presents an even greater stretch of legal reasoning because it construed remarks made by our appeals court entirely out of their jurisprudential context. State v. Garrison, 711 N.W.2d 732 (table) (Iowa App 2006) was an **unpublished** decision which considered the denial of a criminal defendant's discovery request for complete employee evaluations. It was decided under an **abuse of discretion standard**. The appeals court held it was not an abuse of trial court discretion to prevent a criminal defendant from going on an apparent fishing expedition into the non-germane personnel files of an investigatory official.

[11] The Iowa Supreme Court actually approved use of a balancing analysis used by federal courts **before** it decided *Des Moines Schools. See, City of Dubuque,* 297 N.W.2d at 526.

Garrison did not make any sort of final or categorical holding concerning the non-releasability of "personnel information." It merely concluded, parenthetically, that "in house job performance documents" are "prima facie exempt" (*rather than "absolutely exempt"*) from disclosure, under Iowa Code §22.7(11)." Id. at 19. Recently our federal court in the Northern District of Iowa rejected the notion that Iowa Code §22.7(11) creates a categorical privacy exception when it upheld the discovery of a law enforcement officer's complete personnel file. *See,* Shannon v. Koehler, No. C 08-4059-MWB,2010 WL 3943661, at *2–3–3 (N.D. Iowa Oct. 6, 2010) {applying the *DeLaMater* balancing test to a discovery issue similar to that considered in *Garrison*}.

Moreover, in *Garrison*, the Court of Appeals, itself, **chose to publicly disclose**, for the first time, the **detailed disciplinary consequences** that were imposed on the lab employee whose records were sought. Id., at 19. It was a stretch indeed, for the court below to rely on a case where the confidentiality of disciplinary measures was never analyzed under the standards of Iowa's Open Records Statute, and where the appeals court itself actually revealed the precise type of information sought to be concealed in this case. Insofar as it is instructive, *Garrison* sets a prime example for granting the plaintiff's records request.

f. Caselaw comparisons

For additional guidance we can look to case law. The Hawkeye v. Jackson, 521 N.W.2d 750,*754 (Iowa 1994), was an Iowa case ordering the release of a **full investigatory report** into police misconduct. Other courts have reached similar conclusions concerning the very type of information sought in this case. *E.g.*, Hackworth v. Bd. Educ. City of Atlanta, et al., 214 Ga. App. 17,*22, 447 S.E.2d 78, 82 (1994) {"[*P*]rivacy rights cannot outweigh this public interest in the disclosure of information regarding the [*school bus*] drivers' job performance, **disciplinary actions**, accidents on the job, and the like." *emphasis supplied*}. In Wisconsin NewsPress, Inc. v. Sch. Dist. Sheboygan Falls, 199 Wis.2d 768,*786, 546 N.W.2d 143,*150 (1996) the Wisconsin Supreme Court ordered the release of records including a School District's letter to employee describing **disciplinary sanctions** being imposed. *See also,* Woznicki v. Erickson, 202 Wis.2d 178, 549 N.W.2d 699 (1996) {no blanket confidential information exception for **personnel records** of teacher charged with having sex with a minor}. *But see,* Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989) {entirely distinguishable because the Rhode Island Supreme Court interpreted that

state's personnel records exception[12] to be absolute and not amenable to a balancing analysis.}

In sum, the school district failed to meet its factual burden under summary judgment and Iowa Code Chapter 22 to establish that the information sought was protected by a reasonable expectation of privacy." The district court erred by granting summary judgment, nonetheless, under a flawed legal analysis that did not include consideration of the undisputed facts favoring disclosure or any of the other required inquiries of the *DeLaMater* balancing analysis.

2. *De novo* review

a. The merits can be decided on appeal

With little or no dispute as to the underlying facts, this court is in a position to decide the merits in the course of its *de novo* review. *E.g.*, *Clymer* {determining the result and remanding only for the appropriate order}; *C.f.*, Richards v. Hardin County Bd. of Review, 393 N.W.2d 148,*150 (Iowa 1986) {"We are empowered to decide the ultimate issues involved *de novo* on appeal."}; *C.f.*, Armstrong v. Iowa Bldgs. & Grounds,

[12] Exempting disclosure of "**all records**...identifiable to an...employee including... personnel...records" Code of Rhode Island § 38-2-2(d)(1)

382 N.W.2d 161,*165 (Iowa 1986). {"a remand for agency fact-finding is unnecessary when the facts are established as a matter of law. ...The reviewing court can determine the facts as a matter of law when the relevant evidence is both uncontradicted and reasonable minds could not draw different inferences from the evidence. *McSpadden*, 288 N.W.2d at 186."}.

b. Application of the *DeLaMater* balancing analysis to this case

In *Clymer*, the Iowa Supreme Court reiterated its reliance on the *DeLaMater* balancing test stating:

> When, as is the case under section 22.7(11), a statutory exemption does not articulate precisely what records or information the legislature considers private, courts commonly apply the following factors as a means of weighing individual privacy interests against the public's need to know:
>
> (1) the **public purpose** of the party requesting the information;
>
> (2) whether the purpose could be **accomplished without the disclosure** of personal information;
>
> (3) the **scope** of the request;
>
> (4) whether **alternative sources** for obtaining the information exist; and
>
> (5) the **gravity** of the invasion of personal privacy.

Clymer at 45 *citing DeLaMater* at 879{*formatting altered and emphasis supplied*} These factors are discussed in turn below:

i. Public Purpose

In this case the school district's publicly defended the strip searches stating that they conformed to district policies. [App. 35-39] The ACLU of Iowa seeks to expose for benefit of the public and its own advocacy whether, in view of the school district's prior stance, its administrative response to professional misconduct was adequate or merely a pretense. Iowa Code §808.2(4),[13] prohibiting strip searches of students by school officials, surely reflects a strong social norm against invading the bodily privacy of teen age girls. Yet, a violation of the statute itself is not connected with any enforcement mechanism. The only meaningful check on an inadequate response of school officials to a student strip search is the light of public scrutiny.

Compare, The Hawkeye, where our state supreme court ordered the release of a full investigatory report into police misconduct:

> There can be little doubt that allegations of leniency or cover-up with respect to **the disciplining** of those sworn to enforce the law are matters of great public concern.

Id., 521 N.W.2d at 754.[14] {*emphasis added*}

[13] "A school official shall not conduct a search which involves:...a. A strip search." Id.

[14] *Prima facie* evidence of wrongdoing is irrelevant and not required. Clymer 601 N.W.2d at 46-7. {"The issue is whether the information falls within an exemption from chapter 22's general rule of disclosure, and not whether the public...suspects abuse..."}

Other courts have reached similar conclusions concerning the public importance of the very type of information sought in this case:

> The public has a strong and legitimate interest in this case in certain portions of the [*school*] bus drivers' records ..., since they affect the safety of the children transported to and from Atlanta public schools. ...

Hackworth 447 S.E.2d at 82 {releasing "**disciplinary actions**" as well as other job related information};

> [*Beyond the general public interest in being fully informed as stated in the public records statute*] The public has a particularly strong interest in being informed about public officials who have been "derelict in [their] duty." *Youmans*, 28 Wis.2d at 685, 137 N.W.2d 470; see also *Shorewood*, 186 Wis.2d at 459, 521 N.W.2d 165.

Wisconsin NewsPress 546 N.W.2d at 150 {ordering release of records including School District's letter to employee describing **disciplinary sanctions** being imposed.}; *Woznicki* 549 N.W.2d 699{no blanket confidential information exception for **personnel records** of teacher charged with having sex with a minor}. Finally, see *Des Moines Schools*, where the entire settlement agreement pertaining to a school administrator accused of misconduct was released. *Id.* 487 N.W.2d at 669. An apparent legislative response to that case made such disclosures routine. Iowa Code, §22.13. How officials respond to misconduct is a matter of intense public interest.

ii. Alternative Solutions

The next two factors to be considered under Iowa jurisprudence are "whether the purpose could be **accomplished without the disclosure** of personal information." and "whether **alternative sources** for obtaining the information exist" *Clymer* at 45 {*emphasis added*}. In this situation the information sought is closely held. Only two parties control its release: the school district and the subject employee. But, being private individuals, employees are not subject to any duty to release information from their own records, and even if an employee could be persuaded to describe the sanction he or she received, the information obtained would be suspect. The uniquely authoritative source in this situation is the district's administrative records.

In *The Hawkeye*, the Iowa Supreme Court ruled that a DCI investigational report into misconduct had to be released, notwithstanding the objection that the newspaper could obtain similar information through its own investigation—precisely because the contents of the report itself was a matter of direct concern. The public needed to know what the report, itself, said in determining whether there had been a coverup or whitewash of alleged police brutality. *Id.* at 754. Similarly, in this case, the public needs to know exactly what sanctions were imposed on the disciplined employees —whether they received a "mere slap on the wrist" or meaningful discipline.

No effective alternative for public scrutiny of the school's response to the strip searches exists. The lack of alternatives weighs strongly in favor of release.

iii. Scope of the Request

The more limited the request for information, the more likely it will be granted:

> In the City of Dubuque case, a newspaper sought disclosure of information contained in applications for a city manager vacancy. City of Dubuque, 297 N.W.2d at 525. The newspaper specifically limited its request to "the name, address, employers, education, training and experience of each of the ... applicants." ...

DeLaMater at 879

In this case, the Petitioner has only sought release of the "specific consequences" received by the two disciplined individuals "including duration or amounts of any penalties or consequences" By contrast, in other cases the Iowa Supreme Court has ordered the release of: [1] information about compensation allocated to and used by individually identified city employees, whether for salary, sick leave or vacation (*Clymer*), and the entire settlement document executed between a school district and a principal who faced numerous complaints of misconduct prior to her resignation (*Des Moines Schools*).

In *Hackworth* the Georgia Court of Appeals ordered the "disclosure of information regarding the drivers' job performance, disciplinary actions, accidents on the job, and the like." *Id.* at 83. The Wisconsin Supreme Court ordered the public release of "results of the disciplinary action in the form of the sanctions imposed." *Wisconsin News Press* at 151 {"Now that the investigation has concluded, the public has a right to know its results."}. Later the same court ruled, that the entire personnel of record of a school employee was disclosable. *Woznicki* at 705-6. Plainly, other courts have ordered more sweeping disclosures than those sought in this case.

The Petitioner does not seek any details of personal misconduct that might reflect poorly on the two disciplined employees, nor is any inquiry made into whether there has been a pattern of other troubles or conduct that might be revealed by their personnel file. The only information sought is the nature and extent of sanctions imposed by the school district on a single occasion already in the public spotlight. The scope of this request is more than reasonable in comparison to disclosures ordered in other cases.

iv. Gravity of the Invasion

As just noted, the Petitioner's request is directed to the response of the school district, and not to the actual conduct or job performance of its employees. If the request touches upon the privacy of the employees, the

effect is merely superficial and tangential. Under Iowa Code Chapter 22 the gravity of an invasion cannot be judged upon embarrassment to public officials {Iowa Code §22.8(3)} rather, this court must look to whether the request deeply intrudes into legally cognizable expectations of privacy. Under a statute that presumes government records are open, the burden of establishing that privacy rights are at stake rests upon the party asserting those rights. Iowa Code §22.10. No evidence was submitted on that point.

More generally, there is no social consensus that that wrongdoers have a privacy right to conceal their disciplinary records from others. Convictions for crimes and civil infractions are a matter of public record published in the paper, internet registries, and in other media. Cities and industries that pollute or violate safety laws end up on government lists with their fines reported. Employers freely share personnel information about past and prospective employees with each other (Iowa Code §91A.2), and, most importantly, professionals are publicly disbarred, suspended or reprimanded for malpractice. It should not be assumed that school employees, who are likewise held to professional standards, and who operate within the public trust, have any less public accountability than all of the other licensed professions—especially when their actions have violated state law concerning the treatment of vulnerable youth (Iowa Code §808A.2).

At least one court has held that school administrators have a diminished expectation of privacy with respect to records of their professional performance. *Wisconsin News Press* at 787.[15]

Direct guidance is also provided by Iowa Code §22.8(3) itself:

> In actions brought under this section the district court shall take into account the policy...that the free and open examination of public records is generally in the public interest even though such examination may cause ... **embarrassment** to...**others.**

Thus, in Iowa, the zone of privacy is defined by a legitimate need to know and not by the potential for personal embarrassment.

Nevertheless, other courts, following the law of their own jurisdictions, occasionally have factored "embarrassment" into a privacy analysis. In Morales v. Ellen, 840 S.W.2d 519, 524 (Tx App. 1992), a Texas Court of Appeals included potential for embarrassment in its analysis:

[15] "...our courts have recognized that a prominent public official, or an official in a position of authority, should have a lower expectation of privacy regarding his or her employment records. In State ex rel. Bilder v. Township of Delavan, 112 Wis.2d 539, 557, 334 N.W.2d 252 (1983), this court allowed access to a police chief's files, noting that "[t]he documents in issue apparently contain information relating directly to [the police chief's] professional conduct.... By accepting his public position [the police chief] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official." Similarly, in *UW-Platteville*, 160 Wis.2d at 41, 465 N.W.2d 266, the court of appeals noted, in its application of the balancing test in an open records case, that the dean of a department at a state university, in taking his position "of public prominence," had "little reasonable expectation of privacy regarding his professional conduct." In the matter presently before the court, we note that Mr. Frakes was the **administrator of the school district**, a position which elevated him to the view of the public; we thus, in our application of the balancing test, assign less weight to his personal expectation of privacy regarding activities related to his employment."

> Specifically, the individual seeking to prevent disclosure of records for privacy reasons must meet a twofold test, that: (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person; and (2) the information is not of legitimate public concern.

Even by this standard, the record below cannot support a reasonable expectation of privacy. In this case the petition seeks no "highly intimate or embarrassing facts" —especially in view of what has already been disclosed to the public. It is already known that two named employees were disciplined for their role in an allegedly illegal strip search of five teenage girls. Surely, the discipline, itself, was not so unorthodox in nature as to be scandalous or demeaning by its very nature. The incremental information sought in this case reveals nothing more "intimate" or "embarrassing" than what is already known.

Given the diminished expectations of privacy that high school administrators have in their job performance, the information that has already been made public, and the limited and superficial nature of the request for information, this court should conclude that the the "gravity" of the supposed invasion in this case is no more than "slight." This matter should be resolved in the way chosen by the Wisconsin Supreme Court in a similar situation regarding disciplinary records of a school administrator:

> When exposing such misconduct, "the fact that reputations may be damaged would not outweigh the benefit to the public interest in obtaining inspection." *Youmans*, 28 Wis.2d at 685, 137 N.W.2d 470....
>
> [*A*]lthough release of disciplinary records might cause some reputational harm to Mr. Frakes,..., we may nonetheless consider the public's interest in information about misconduct by public officials to weigh more heavily in the balancing of interests.

Wisconsin News Press at 786-7 (1996).

c. Summary

"In City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523, 526-27 (Iowa 1980), we [*the Iowa Supreme Court*] said the legislature intended for the disclosure requirement to be interpreted broadly, and for the confidentiality exception to be interpreted narrowly." *Des Moines Schools*, at 670. In Iowa there is no hard line for determining when a matter withheld under the exception for "personal information in confidential personnel files" is truly "personal" and "confidential." Each case must be judged on its own facts. Except in extreme instances where the equities are clear, the Iowa Supreme court requires the multi-factor balancing analysis articulated in *Clymer*. Applying that analysis to the present controversy leads to the following conclusions:

1. There is an undeniably strong public purpose in shedding light on the responses of school administrators to strip searches of teenage girls conducted in spite of longstanding and authoritative prohibitions.

2. Release of the requested information is the only way to determine if the strip searches were dealt with in a serious and appropriate fashion.

3. The Petitioner has reasonably limited the scope of its request seeking no gratuitous, extraneous or private information calculated only to embarrass.

4. The gravity of any claimed intrusion is low given the fact that the public already knows who the subject employees are and that they were allegedly disciplined. Moreover, as licensed professionals entrusted with the care of children, school officials have a diminished expectation of privacy in shielding their employment activities from public view.

5. No flesh and blood employee ever actually claimed the right to privacy that was asserted in this case. The record submitted by the school district fails to establish its entitlement to benefit from the exception to disclosure under Iowa Code §22.7(11).

Accordingly, this court should rule that the Atlantic Community School District must comply with the Petitioner's open records request.

—∞—

CONCLUSION

The decision on the merits below should be reversed and judgment for the Plaintiff should be granted with a provision for reasonable attorney's fees and costs as required by Iowa Code §22.10(3)(c).

REQUEST FOR ORAL ARGUMENT

The Appellant, ACLU of Iowa Foundation, Inc., requests oral argument.

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